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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PUERTO RICO PORT AUTHORITY,
Petitioner,

v.

BROTHERHOOD OF OFFICE AND COMMERCIAL WORKERS AND CATAÑO TRANSPORTATION WORKERS UNION,
Respondents.

On Petition for a Writ of Certiorari to the Superior Court of Puerto Rico, San Juan Division

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BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents, the Brotherhood of Office and Commercial Workers and the Cataño Transportation Workers Union (the "Unions"), submit this brief in opposition to the petition for a writ of certiorari filed by the Puerto Rico Port Authority ("Port Authority").

JURISDICTION

The Unions agree that the two motions for reconsideration filed in the Supreme Court of Puerto Rico were timely and that the petition for writ of certiorari, filed within 90 days of the denial of the second motion for reconsideration authorized by Rule 45(c) of the Rules of the Supreme Court of Puerto Rico, is timely.

STATEMENT OF THE CASE

This case arises from judicial review of a labor-management arbitration award applying a regulation of the Minimum Wage Board of Puerto Rico to provisions for vacation leave in the collective bargaining agreement between each Union and the Port Authority.

1. Background. Prior to July 6, 1989, the regulation of the Minimum Wage Board of Puerto Rico that was applicable to the transportation industry, the "Seventh Revision" of Mandatory Decree No. 38, required that covered employees earn paid vacation leave at a monthly rate equivalent to 15 days per year. By agreement with the employer, vacation leave could "accrue" for more than a year but not for more than two years.[1] In other words, the employee was entitled to postpone his vacation leave for up to two years after it was earned, but for no longer. Any employee denied compensation, including paid vacation leave, had a statutory right to bring a civil action for the unpaid amount and, if successful, would recover the unpaid amount and, in addition, an amount equal to the unpaid amount. Law No. 96 of June 26, 1956, § 27(a), as amended, P.R. Laws Ann. tit. 29, § 246b(a) (1990 Supp.) (Pet. 33a).

Effective July 6, 1989, after due notice,[2] the Minimum Wage Board amended Mandatory Decree No. 38 in the "Eighth Revision" by, among other things, adding the following paragraph:

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[1] See Pet. 34a, first paragraph on that page. That paragraph, quoted from the Decree as amended effective July 6, 1989, was essentially identical in the version of the Decree in effect before July 6, 1989. See Pet. 20a.

[2] P.R. Laws Ann. tit. 29, § 245*l* (1990 Supp.) (partially quoted at Pet. 32a), gives employers a minimum of 45 days between notice of a proposed regulation and the effective date of the final regulation. In this case, hearings were announced in March 1989, and the draft Eighth Revision was published on May 11, 1989, almost two months before July 6, 1989.

> "Any employer who does not grant any of his employees the vacation time that he is entitled to after it has been accumulated for two (2) years, must grant him the total accumulated, paying two (2) times the corresponding salary for the period in excess of said two years." Pet. 34a.

The collective bargaining agreements between the Unions and the Port Authority, in effect on July 6, 1989, and during the relevant periods thereafter, provided that employees earned a greater amount of vacation leave each year than required by Mandatory Decree No. 38: 30 days per year for the Brotherhood of Office and Commercial Workers, and 27 days per year for the Cataño Transportation Workers Union. See Pet. 14a-16a. In addition, the agreements allowed employees to "accumulate" or "bank" indefinitely vacation leave in excess of 20 days per year. The employee could use that accumulated vacation leave whenever he or she pleased, and any unused vacation leave would be paid off when the employee retired or resigned. See Pet. 4 & n.7. The Port Authority has taken the position that these agreements complied with Mandatory Decree No. 38.

2. The Arbitration Proceeding. In 1990, the Unions filed grievances under the collective bargaining agreements, contending, among other things, that the Port Authority was acting contrary to Mandatory Decree No. 38 in its treatment of vacation leave. The parties disagreed over (1) what portion of accrued vacation leave must be paid at double pay under the Decree, and (2) whether the double-pay obligation of the Decree applied to vacation days that had accumulated in excess of two years on or at any time after July 6, 1989, or, as the Employer contended, only to vacation days that were earned after July 6, 1989 (so that the double pay obligation could first come into effect two years later, in 1991). See Pet. 15a-21a.

Under the collective bargaining agreements, the issues raised by the grievances were presented to an arbitrator for binding decision. No issue of federal constitutional law was presented or reserved by the Port Authority. The arbitrator ruled partly for the Unions and partly for the Port Authority. Of relevance here, the arbitrator ruled that, under the Decree, double pay was payable on *any* vacation leave accumulated in excess of two years. Pet. 16a-17a. Thus, "[o]nce the employee accrues the maximum [number of days] that may be accrued in two years under the Agreement, he is entitled to double pay for all leave that exceeds the maximum that may be accrued in those two years * * *." Pet. 21a-22a. In addition, the arbitrator rejected the Port Authority's argument that its double pay obligation under the Decree would not apply to any accumulated vacation leave until August 1991, on the ground that such delayed effect could not have been intended by the Minimum Wage Board. Pet. 17a-21a. In doing so, the arbitrator ruled that, under the Seventh Revision of the Decree, in effect prior to July 6, 1989, the Port Authority had been forbidden to allow any vacation leave to accrue for more than two years. Pet. 20a.

Thus, the Port Authority errs in repeatedly stating (Pet. 9, 11, 13, 16-17, 18, 24) that before July 6, 1989, "the law permitted" the contractual arrangements under which employees could accumulate or "bank" vacation days in excess of the days required by the Decree.[3] And the Port Authority also errs in taking the position (Pet. 6 n.8, 9, 14, 18, 22, 25), that the Eighth Revision requires double pay for improperly accumulated vacation days *in addition to* the single pay already required by the Decree and the collective bargaining agreements. As interpreted by the arbitrator, the Decree simply requires double pay instead of single pay. Thus, the *new* payment required by the

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[3] As we explain below (p. 12 & nn.10-11, p. 15 n.14), the Port Authority's mischaracterization of the arbitrator's ruling permeates its argument for certiorari.

revised Decree is another day's pay—not double pay or triple pay in addition to a day's pay, as the Port Authority suggests.

The arbitrator also ruled (Pet. 22a & n.19) that the Port Authority must pay the penalty imposed by Law No. 96 of June 26, 1956, § 27(a), as amended, which applies whenever an employer's conduct forces employees to litigate their wage and hour rights. See p. 2 *supra*. The application of that law doubled the Port Authority's obligation from double pay for each day of vacation improperly accumulated in excess of two years to four days' pay.

3. The Puerto Rico Superior Court Review Proceeding. The Port Authority sought vacation of the arbitration award by filing suit in the Superior Court of Puerto Rico. With respect to the alleged retroactive effect of the Decree, it argued, again, that its obligation to pay double for excess annual leave should not begin until August 1991, two years after the effective date of the revised Decree. See Pet. 2a. The Superior Court affirmed the arbitration award, relying on the arbitrator's ruling that accumulations in excess of two years had been in violation of the public policy of the Decree even before the 1989 revision. Pet. 2a-4a. The Port Authority made no argument based on federal constitutional law, and the Superior Court decision does not address any such issues.

4. Denial of Discretionary Review by the Puerto Rico Supreme Court. The Port Authority filed a timely petition for discretionary review in the Supreme Court of Puerto Rico. It is undisputed that the Port Authority made no arguments based on federal constitutional law in that petition. Instead, the Port Authority's arguments were based entirely on Puerto Rico law.

The Supreme Court of Puerto Rico denied the Port Authority's petition for discretionary review. Pet. 24a. In doing so, the Supreme Court briefly described its rea-

sons, as required under a then-recent law.[4] As to the Port Authority's contention that the Puerto Rico Civil Code prohibited any retroactive application of the Mandatory Decree,[5] the Court noted that it had held in 1973 and 1983 that this provision was "a general rule of interpretation and not a 'principle of inflexible application.'" Pet. 24a. The Court further observed that the penalty of revised Mandatory Decree No. 38 "advances and is in consonance with the public policy." Pet. 25a. With respect to the Port Authority's contention that the double penalty imposed by Law No. 96 of June 26, 1956, was impermissible under Puerto Rico law, the Court observed that the penalty was clearly applicable. Pet. 25a-26a.

5. Federal Questions Raised for the First Time on Motion for Reconsideration. The Port Authority then filed with the Supreme Court of Puerto Rico a timely motion for reconsideration of the denial of review. Pet. 35a-39a. This motion, as the Port Authority states (Pet. 7-8), contended that Mandatory Decree No. 38 violated Article II, § 7, of the Puerto Rico Constitution ("No laws impairing the obligation of contracts shall be enacted."), and Article I, § 10, of the U.S. Constitution. The motion (at Pet. 39a) cited *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977); *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978); and Laurence E. Tribe, *American Constitutional Law* 617 *et seq.* (2d ed. 1988), the principal authorities concerning the Contract Clause upon which the Port Authority now relies. There was no mention of the prohibition against *ex post facto* laws in Article I, § 10, of the U.S. Constitution and no citation to cases concerning that pro-

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[4] Law No. 11 of June 2, 1993 (not yet codified).

[5] Section 3 of the Puerto Rico Civil Code, 1930, P.R. Laws Ann. tit. 31, § 3 (1993), provides: "Laws shall not have a retroactive effect unless they expressly so decree."

vision. The Puerto Rico Supreme Court denied the motion by order. Pet. 28a.

As permitted by the Rules of the Puerto Rico Supreme Court, the Port Authority then filed a second motion for reconsideration (Pet. 40a-43a), citing the same provisions and the same authorities. The Puerto Rico Supreme Court again denied the motion by order. Pet. 29a.

REASONS FOR DENYING THE WRIT

I. THE CONSTITUTIONAL QUESTIONS THAT PETITIONER SEEKS TO PRESENT WERE NOT PROPERLY PRESENTED TO THE COURTS OF PUERTO RICO.

As set forth above in the Statement of the Case, the Port Authority did not raise the federal constitutional questions it seeks to present here in the arbitration proceeding or in the only court to issue a decision on the merits: the Puerto Rico Superior Court.

Nor did the Port Authority raise the federal constitutional questions in its petition for discretionary review in the Puerto Rico Supreme Court, which, in any event, refused to hear the case.

The Port Authority's position appears to be that the federal questions were properly presented below because they were raised, for the first time, in the Port Authority's motion for reconsideration of the Puerto Rico Supreme Court's refusal of discretionary review and because, under Puerto Rico law, "a question of law (including a constitutional question) may be raised before the Supreme Court of Puerto Rico even if it was not raised below." Pet. 7-8 & n.11 (citing five cases of the Puerto Rico Supreme Court).

The Port Authority's position is wrong for several reasons. None of the cases that the Port Authority cites discuss the raising of constitutional questions for the first

time on a motion for reconsideration in the Puerto Rico Supreme Court. Thus, these cases do not in any way show that the Puerto Rico Supreme Court entertains constitutional questions raised for the first time at such a late date.

In any event, even if the Puerto Rico Supreme Court might consider it appropriate, in some cases, to entertain constitutional questions raised for the first time on motion for reconsideration, in this case that Court denied both motions for reconsideration by order. Thus, there is no evidence in the record that the Puerto Rico Supreme Court did entertain the Port Authority's constitutional arguments on the merits.

The failure of the Puerto Rico Supreme Court to grant either motion for reconsideration and thus to entertain and rule on the newly-raised federal questions is a sufficient reason for this Court to deny certiorari. "Raising the federal question for the first time in a petition for rehearing addressed to the highest state court is generally insufficient unless the court actually entertains the petition and expressly decides the question." Robert L. Stern *et al., Supreme Court Practice* 127 (7th ed. 1993) (citing cases). That did not occur here.

This is not a case in which the federal question "is created by an unexpected decision of the highest state court, giving the litigant no prior opportunity to anticipate or assert the particular federal question * * *." *Id.* at 129 (citing *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 677-78 (1930)). The federal questions were apparent, at least after the ruling by the arbitrator, and the Port Authority argued against the application of the revised Decree to vacation leave accrued before 1989 both in the Puerto Rico Superior Court and in its petition for discretionary review in the Puerto Rico Supreme Court. It did so, however, only on the basis of Puerto Rico law. Moreover, it cannot have been "unexpected" that the Puerto Rico courts would affirm or de-

cline to overturn the award of a labor arbitrator. Finally, when the Port Authority did raise its federal constitutional claims, in the motions for reconsideration filed with the Puerto Rico Supreme Court, it relied on *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977), and *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978)—decisions that were available to it at the beginning of this litigation.[6]

It is true that this Court has, on rare occasions, considered on writ of certiorari a federal question raised for the first time in a petition for rehearing that was denied without comment by a state supreme court. *Hathorn* v. *Lovorn*, 457 U.S. 255, 262-65 (1982). Nevertheless, where the late raising of the federal issue results in the absence of "a well-developed record and a reasoned [state court] opinion on the merits" of the federal question, *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 79, 80 (1988), prudential considerations counsel strongly against the granting of certiorari.[7]

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[6] While the Port Authority's motions for reconsideration did raise, for the first time, an issue under that part of the first sentence of Article I, § 10, of the U.S. Constitution dealing with the obligation of contracts (the "Contract Clause") by citing two Supreme Court cases addressing that clause, those motions cannot fairly be read as separately raising an issue concerning that part of the same sentence of Article I, § 10, dealing with *ex post facto* laws. The words *"ex post facto"* were not used, and none of the leading cases concerning the Ex Post Facto Clause were cited. A "vague appeal to constitutional principles" in a petition for rehearing below does not properly raise a federal constitutional issue, and language sufficient to invoke one provision of the Constitution may be "too oblique" to support a conclusion that another provision has been invoked. *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 77 (1988).

[7] In *Hathorn* v. *Lovorn*, *supra*, while the federal question (relating to the Voting Rights Act) had been first raised in a petition for rehearing to the Mississippi Supreme Court, that court had remanded the case for further proceedings on other grounds, and, on remand, the lower state court entertained the federal question

The Port Authority had every opportunity to present its constitutional claims in a timely manner below, but instead litigated its case on the basis of Puerto Rico statutory law. No good purpose would be served by this Court considering on the merits, in response to the Port Authority's last-minute change in its litigation strategy, whether to reverse the Puerto Rico courts on issues that were not presented until after denial of discretionary review by the Puerto Rico Supreme Court and thus were not addressed by the arbitrator or by any court below.

The Port Authority's failure to present its federal questions properly below is a sufficient basis for denying certiorari in this case. We show below that, in any event, those federal questions do not merit this Court's plenary consideration.

II. PETITIONER'S CONTRACT CLAUSE CONTENTIONS, EVEN IF PROPERLY PRESENTED, DO NOT MERIT REVIEW BY THIS COURT.

The only federal question presented at any time to any court below concerned the Contract Clause. As we show below, the Port Authority's attempts to show that the decisions below conflict with the decisions of this Court rely on contentions respecting Puerto Rico law that were lost below and do not raise any issue meriting review by this Court.

Although the language of the Contract Clause—"No State shall * * * pass any * * * Law impairing the Obligation of Contracts," U.S. Const. art. I, § 10, cl. 1—is facially absolute, this Court has recognized that "its prohibition must be accommodated to the inherent police power of the State." *Energy Reserves Group, Inc.* v.

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and issued two decisions on the application of the Voting Rights Act to the case at hand. Thus, in contrast to this case, *Hathorn* presented a federal question that, by the time this Court granted certiorari, had been fully litigated and decided in the lower state court, though not in the state supreme court.

Kansas Power & Light Co., 459 U.S. 400, 410 (1983). The first question is whether a State law operates as "a substantial impairment of a contractual relationship." *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 244 (1978).[8] Even if it does, a State may justify such impairment upon a showing of "a significant and legitimate public purpose," where the legislature's " 'adjustment of "the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." ' " *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 505 (1987) (quoting *Energy Reserves Group*, 459 U.S. at 412, and *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 22 (1977)). The Port Authority cannot demonstrate that the courts of Puerto Rico failed to apply or improperly applied these tests, because the late raising of the federal question meant that it was never addressed below. Nor can it demonstrate that the rulings are necessarily so erroneous that certiorari should nevertheless be granted.

(a) In considering whether a state law meets the initial test of "a substantial impairment of a contractual relationship," this Court relies heavily on the extent to which the conduct covered by the law has been regulated in the past.[9] In *Allied Structural Steel*, the case on which

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[8] While Puerto Rico is not a State, the "rights, privileges, and immunities of citizens of the United States" are respected in Puerto Rico "to the same extent as though Puerto Rico were a State of the Union * * *." 48 U.S.C. § 737 (1988).

[9] *Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 194 & n.14 (1983) (state law increasing oil and gas tax and prohibiting producers from passing increase to customers did not substantially impair producers' obligations under sale contracts where oil and gas industry was already "subject to heavy regulation"); *Energy Reserves Group*, 459 U.S. at 411, 413-16 & n.18 (state law imposing price controls on intrastate natural gas market did not substantially impair obligations under gas purchase contracts where state had long regulated other aspects of the natural gas industry).

the Port Authority principally relies, the Court stressed that the pension plan obligations imposed by the state law were "totally unanticipated" and that the state had not previously regulated the private pension plan field. 438 U.S. at 249.

This consideration points here strongly in the Unions' favor, because the Port Authority's contractual obligations with regard to vacation time were heavily regulated prior to July 6, 1989. Indeed, contrary to the Port Authority's repeated statements that its contractual obligations were substantially impaired because "the law permitted" its conduct before July 6, 1989 (Pet. 9, 11, 13, 16-17, 18, 24), Puerto Rico had previously proscribed accumulation of vacation time for more than two years, and even provided a penalty whenever a civil action was required.[10] The effect of the revised Decree at issue here was merely to impose an obligation of double pay on excess accumulated vacation leave where, even under the prior Decree, the employees would have been entitled to immediate use of their accumulated vacation time at single pay.[11] The Port Authority was clearly on notice that its

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[10] As explained in the Statement of the Case, the Port Authority's repeated claim that its conduct before July 6, 1989, was "permitted by law," misreads the decisions of the arbitrator and of the lower court. The ruling of the aribtrator that the public policy of the Decree, even before 1989, prohibited the accumulation of vacation leave for more than two years was an interpretation of Puerto Rico law that was not disturbed by the Puerto Rico courts. Its correctness is not subject to review in this Court. See 28 U.S.C. § 1258 (1988); *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328, 339 n.6 (1986) ("A rigid rule of deference to interpretations of Puerto Rico law by Puerto Rico courts is particularly appropriate given the unique cultural and legal history of Puerto Rico.").

[11] The Port Authority also claims "substantial impairment" because it became obliged to pay "*three times* the amount that it * * * had agreed would be paid for vacation days that employees elected to bank." Pet. 14 (emphasis in original). See also Pet. 18. As we have explained in the Statement of Facts, the additional

"contractual rights were subject to alteration" by further regulation. See *Energy Reserves Group*, 459 U.S. at 416. No case cited by the Port Authority suggests that this Court, or any court, would find the change that occurred to be the kind of "substantial impairment" that triggers application of the Contract Clause.

(b) Even if "substantial impairment" could be found, the Port Authority has failed to demonstrate that the Decree at issue here would violate the Contract Clause. Even substantial impairment of contractual obligations is justified when the law that caused the impairment serves "a significant and legitimate public purpose," *Keystone Bituminous Coal Ass'n*, 480 U.S. at 505, as opposed to "providing a benefit to special interests." *Energy Reserves Group*, 459 U.S. at 412. Thus, the state law invalidated in *Allied Structural Steel* was not enacted to meet "an important general social problem," but instead "had a very narrow focus" and "may have been directed at one particular employer." *Energy Reserves Group*, 459 U.S. at 412 n.13 (discussing *Allied Structural Steel*). And in upholding state laws against Contract Clause challenges in the years since *Allied Structural Steel*, this Court has relied on the fact that the laws were not "special interest legislation." [12]

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obligation of double the amount required by the revised Decree at issue here stems from the application of the 1956 Puerto Rico law that penalizes employers that force their employees to litigation. The application of that old law cannot be laid at the feet of the Decree at issue here.

[12] See *Exxon*, 462 U.S. at 191-92 (upholding law that prohibited oil and gas producers from passing tax increase to customers because state had legitimate public interest in protecting consumers from the tax increase, and law "applied to all oil and gas producers," and thus "imposed a generally applicable rule of conduct"); *Energy Reserves Group*, 459 U.S. at 416-17 & n.25 (upholding law that imposed natural gas price controls because state had legitimate public interest in protecting consumers and coordinating interstate and intrastate markets, and there was little or no evidence that the law was "special interest legislation").

These cases also point strongly in favor of the decisions below. The Decree at issue here applies to all employers of transportation workers in Puerto Rico and thus is presumptively a valid exercise of the Commonwealth's power to regulate the wages and hours of its workers.

(c) In the last step of the Court's Contract Clause analysis, courts should " 'properly defer to legislative judgment as to the necessity and reasonableness of a particular measure,' " *Energy Reserves Group*, 459 U.S. at 413 (quoting *United States Trust Co.*, 431 U.S. at 22-23), "unless the State is itself a contracting party." *Keystone Bituminous Coal Ass'n*, 480 U.S. at 505.

Under these cases, deference to Puerto Rico's judgment is appropriate. The reservation in the *Keystone* passage about contracts in which a State is a party is designed not to protect the State from itself—which is entirely unnecessary—but to protect parties who have contracted with the State from laws that reduce the State's obligations.[13] Here, while the Port Authority is a public corporation and thus may be considered the Commonwealth for some purposes, the Decree at issue *increases* the Port Authority's obligations. Accordingly, the deferential standard of review required by *Keystone* and *Energy Reserves Group* would be given the Decree in this case.

Under the required deferential standard of review, the decision below would pass muster. State laws with more severe "retroactive" effect have been upheld by this Court. See *Keystone Bituminous Coal Ass'n*, 480 U.S. at 486, 506 (upholding law that prevented coal mine operators from holding surface estate owners to their contractual

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[13] See *United States Trust Co.*, where the Court invalidated a New Jersey law that retroactively repealed a covenant between New Jersey and New York, thereby impairing New Jersey's own financial obligations to bondholders who relied on a provision in the covenant and noted that "complete deference" to the state's legislative judgment was "not appropriate because the State's self-interest [was] at stake." 431 U.S. at 26.

waivers of liability because state had legitimate public interest in preventing surface damage and statute was not enacted solely for private property owners' benefit).[14]

(d) Although the Port Authority cites several cases from the federal courts of appeals (Pet. 18 & 21 n.22), it does not claim that there is a conflict among the circuits. Nor is the outcome of the present case in conflict with the lower court cases cited by the Petitioner.[15] None

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[14] The Port Authority suggests that the only purpose of the 1989 revision of the Decree was to remedy the problem of employers who did not permit their employees to take even the vacation leave mandated by the Decree itself or who permitted employees to "bank" such mandated vacation time, a purpose not relevant to the Port Authority. Pet. 19. This contention, once again, ignores the fact that the arbitrator ruled that the public policy of the Decree, even before revision, was that *no* vacation time could be accumulated for more than two years and that the Port Authority had violated that policy. Moreover, here again the Port Authority contends that the effect of the revised Decree is unreasonable because it imposes "a penalty of *three days' pay* for every day of vacation in excess of 60 banked prior to July 6, 1989." Pet. 22 (emphasis added). As explained above (pp. 4-5 & p. 12 n.11), the "penalty" of the Decree itself is a single day's pay.

[15] In *Garris* v. *Hanover Ins. Co.*, 630 F.2d 1001 (4th Cir. 1980), in contrast to the present case, the contractual relationship had not previously been regulated by the state, 630 F.2d at 1007, and the interest being furthered by the provision at issue was private rather than public, *id.* at 1010-11. In *Minnesota Ass'n of Health Care Facilities, Inc.* v. *Minnesota Dep't of Public Welfare*, 742 F.2d 442 (8th Cir. 1984), *cert. denied*, 469 U.S. 1215 (1985), the court invalidated a portion of a state statute that required restitution for prior, formerly legal, conduct, and, in contrast with the present case, the retroactive liability was "totally unexpected." *Id.* at 451. In *Nieves* v. *Hess Oil Virgin Islands Corp.*, 819 F.2d 1237 (3d Cir.), *cert. denied*, 484 U.S. 963 (1987), the court invalidated a state statute abolishing the "borrowed employee" defense to tort actions, insofar as it applied to pending cases, because, in contrast with the present case, the retroactivity provision was special interest legislation, specifically designed to change the outcome of the *Nieves* plaintiffs' pending cases and thus could "hardly be viewed as general legislation for the public welfare." *Id.* at 1250.

of those cases demonstrates that the decision of the arbitrator would or should have been struck down had the Port Authority raised its Contract Clause arguments in a timely fashion.

For all of these reasons, the Port Authority has not demonstrated that the Decree as applied below violates the Contract Clause or that this Court should review a constitutional question that was not addressed in this case by any Puerto Rico court.

III. PETITIONER'S EX POST FACTO CLAUSE CONTENTIONS, WHICH WERE NOT PRESENTED BELOW, DO NOT MERIT REVIEW.

As we have explained above (p. 9, n.6), no argument was made to the Puerto Rico courts at any time concerning the Ex Post Facto Clause. But even if this Court were to find such a contention implicit in the Contract Clause citations that were belatedly presented, there is no Ex Post Facto Clause issue that merits review.

This Court has recently reaffirmed its longstanding view that the Ex Post Facto Clause—"No State shall * * * pass any * * * ex post facto Law," U.S. Const. art. I, § 10, cl. 1—is limited to criminal laws. "Legislatures may not retroactively alter the definition of *crimes* or increase the punishment for *criminal* acts." *Collins* v. *Youngblood*, 497 U.S. 37, 38 (1990) (emphasis added). See also *Galvan* v. *Press*, 347 U.S. 522, 531 & n.4 (1954) (refusing to apply the federal Ex Post Facto Clause, U.S. Const. art. I, § 9, cl. 3, to deportation law and noting that the Court "has undeviatingly enforced" the position that the Clause applies only to crimes); Laurence E. Tribe, *American Constitutional Law* 635 (2d ed. 1988) (by the early twentieth century, the Court reached "consensus in favor of the narrower view that only criminal punishment is prohibited by the ban [on *ex post facto* laws]").

The Port Authority primarily relies on this Court's recent decision in *Landgraf* v. *USI Film Products*, 114 S. Ct. 1483, 1505 (1994), where the Court observed, in connection with the punitive damage provision of § 102 of the 1991 Civil Rights Act, that "[r]etroactive imposition of punitive damages would raise a serious constitutional question," and cited several cases that discuss issues concerning *ex post facto* laws. In context, the Court does not appear to have been suggesting that retroactive imposition of punitive damages might *violate* the Ex Post Facto Clause, contrary to its recent decisions, but that, by *analogy* to the Ex Post Facto Clause, such imposition of punitive damages would raise a constitutional question —most likely under the Due Process Clause, which the Port Authority has never raised.[16]

The Port Authority makes no claim that there is a conflict in the circuits on the application of the Ex Post Facto Clause to civil cases. Insofar as we have been able to determine, there is none.

Under the circumstances, the Port Authority's contention that the Decree violates the Ex Post Facto Clause does not merit review by this Court.

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[16] Of the three other Supreme Court cases cited by the Port Authority (Pet. 23), *United States* v. *Halper*, 490 U.S. 435 (1989), concerned only the Double Jeopardy Clause of the Fifth Amendment, and *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), concerned only the Due Process Clause of the Fifth Amendment. Neither construed the Ex Post Facto Clause. The other case, *De Veau* v. *Braisted*, 363 U.S. 144 (1960), which concerned a criminal statute, does not state that the Clause applies in civil proceedings.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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